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A

Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1152–05 OF 2013
MOHAMAD ARIFF, DAVID WONG AND ABANG ISKANDAR JJCA
25 FEBRUARY 2014

C *Tort — Defamation — Defences — Fair comment — Defendant acting maliciously in broadcasting defamatory and false news report — Whether defence of fair comment available*

D *Tort — Defamation — Defences — Justification — Burden of proof — Criteria for invocation of defence — Whether defamatory imputations true — Whether defence of justification available*

E *Tort — Defamation — Defences — Qualified privilege — Defendant acting maliciously in broadcasting defamatory and false news report — Whether defence of qualified privilege available*

F *Tort — Defamation — Defences — Reynold's defence — Defendant acting maliciously in broadcasting defamatory and false news report — Whether Reynold's defence available*

G *Tort — Defamation — Libel — Broadcasting of defamatory news report in television — Plaintiff's twitter statements manipulated and given unwarranted slant by defendant — News report containing additional facts falsely attributable to plaintiff's tweets — Defendant failing to verify content of tweets — Publication defamatory — Whether defamatory imputations true — Whether defence of justification available — Defendant acting maliciously — Whether defences of qualified privilege, Reynold's defence and fair comment available*

H

I The plaintiff/appellant was a Member of Parliament, a Member of the State Legislative Assembly of Perak for Pasir Panjang, a Member of the Central Committee of Parti Islam SeMalaysia ('PAS') and the Head of the Opposition Pakatan Rakyat for Perak. The first defendant/respondent was a broadcasting television company (TV3). The second defendant/respondent was the publisher of the *Buletin Utama* news programme on TV3 ('Buletin Utama') for 30 May 2013 which was broadcasted in the TV3 channel at 8pm. The plaintiff

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commenced this suit for defamation based on a news report published by the defendants in *Buletin Utama* on 30 May 2013 ('the impugned report'). The impugned report was said to be based on the plaintiff's tweets on 28 May 2012 in his Twitter account. The plaintiff had tweeted three statements through his Twitter account on 28 May 2012. The plaintiff claimed that in the impugned report, his twitter statements were manipulated by the defendants to state that the plaintiff had accused the Sultan of Johor of making use of public funds to buy the vehicle registration No WWW1 for RM520,000. The plaintiff's photograph was published alongside during the publication of the impugned report. The plaintiff claimed that he was defamed by the words published by the defendants. The High Court judge dismissed the plaintiff's claim on the grounds that whilst the impugned report was defamatory, the defendants could avail themselves of the defence of justification. The plaintiff appealed against this decision.

Held, allowing the appeal with costs:

(1) In order to succeed in the defence of justification, the defendants had to prove that the said defamatory statement as published by the defendants over TV3 was true, or was substantially true. When juxtaposed next to each other, the statements from the plaintiff's tweets and that of the defendants' as published by them in the impugned report, the defendants had not only given an unwarranted slant to the tweets but also they had added facts allegedly attributable to the tweets when these added facts were not tweeted by the plaintiff in those tweets (see paras 21–23).

(2) The defendants had published the defamatory statements based on their own interpretation of what the plaintiff's tweets had meant. They never did any verification as to the meaning contained in the plaintiff's tweets from the plaintiff himself. The defendants' belief with regard to the meaning of the plaintiff's tweets was based on the tweets attributable to the Tengku Mahkota Johor ('TMJ') which had purportedly rebutted the contents of the plaintiff's tweets. However, the defendants had not verified from the TMJ himself as to the contents of his alleged tweet and more crucially, they had not verified whether the said Twitter account attributable to the TMJ was indeed an account that was maintained by him at the material time. The defendants failed to establish their defence of justification on the balance of probabilities (see paras 26, 28 & 30).

(3) The plaintiff had succeeded in showing that the defendants had published the defamatory statements with malice against him by their failure to verify the tweets with the plaintiff himself, when they themselves agreed that the defamatory statements were serious in their implications vis-a-vis the plaintiff whereby his reputation and image could be adversely affected as result thereof. Further, the defendants had not published the tweets in their original form and substance, but that

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they had instead added on to the plaintiff's tweets what they thought the tweets meant as to their contents as intended by the plaintiff (see para 46).

(4) The defences of qualified privilege and the *Reynold*'s defence as well as the defence of fair comment also failed since there was malice on the part of the defendants when they published the impugned report (see para 54).

[Bahasa Malaysia summary

Plaintif/perayu adalah Ahli Parlimen, Ahli Dewan Undangan Negeri Perak untuk Pasir Panjang, Ahli Jawatankuasa Pusat Parti Islam SeMalaysia (PAS) dan Ketua Pembangkang Pakatan Rakyat untuk negeri Perak. Defendan pertama/responden adalah sebuah syarikat penyiaran ('TV3'). Defendan kedua/responden adalah penerbit program Buletin Utama di TV3 ('Buletin Utama') untuk 30 Mei 2013 yang telah disiarkan di siaran TV3 pada jam 8 malam. Plaintif memulakan tindakan ini atas alasan memfitnah berdasarkan laporan berita yang disiarkan oleh defendan dalam Buletin Utama pada 30 Mei 2013 ('laporan yang dipersoalkan'). Laporan yang dipersoalkan itu dikatakan berdasarkan daripada tweet plaintif pada 28 Mei 2012 di akaun Twitternya. Plaintif telah mengeluarkan tiga tweet menerusi akaun twitternya pada 28 Mei 2012. Plaintif mendakwa bahawa dalam laporan yang dipersoalkan, kenyataan twitternya telah dimanipulasi oleh defendan untuk menyatakan bahawa plaintif telah menuduh Sultan Johor menggunakan dana awam untuk membeli kenderaan dengan nombor pendaftaran WWW1 dengan harga RM520,000. Gambar plaintif telah disiarkan bersama semasa penyiaran laporan yang dipersoalkan. Plaintif mendakwa dia telah difitnah dengan perkataan-perkataan yang disiarkan oleh defendan. Hakim Mahkamah Tinggi menolak tuntutan plaintif atas alasan bahawa walaupun laporan yang dipersoalkan itu adalah fitnah, defendan boleh menggunakan pembelaan justifikasi. Plaintif merayu terhadap keputusan itu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Untuk menjayakan pembelaan justifikasi, defendan hendaklah membuktikan bahawa kenyataan fitnah seperti yang disiarkan oleh defendan di TV3 adalah benar atau ketara benar. Apabila diletakkan bersebelahan antara satu dengan lain, kenyataan tweet plaintif dan laporan defendan adalah seperti yang disiarkan oleh mereka dalam laporan yang dipersoalkan, defendan bukan sahaja telah memberikan tweet plaintif tanggapan serong tetapi mereka juga turut menambah fakta yang didakwa diambil daripada tweet plaintif apabila fakta-fakta tidak tidak ditweet oleh plaintif dalam tweet tersebut (lihat perenggan 21 & 23).

(2) Defendan telah menyiarkan kenyataan fitnah berdasarkan interpretasi mereka terhadap maksud tweet plaintif. Mereka tidak pernah

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mengesahkan maksud terkandung di dalam tweet plaintif daripada plaintif sendiri. Pemahaman defendan berkaitan dengan maksud tweet plaintif adalah berdasarkan tweet yang ditujukan kepada Tengku Mahkota Johor ('TMJ') yang mana kononnya telah membalas kandungan tweet plaintif. Walau bagaimanapun, defendan tidak mengesahkan daripada TMJ sendiri tentang kandungan tweetnya yang terdakwa dan lebih penting lagi, mereka tidak mengesahkan sama ada akaun Twitter tersebut yang dinamakan kepada TMJ adalah sememangnya akaun yang dikendalikan oleh TMJ pada waktu material. Defendan gagal untuk mengemukakan pembelaan justifikasi mereka atas imbangan kebarangkalian (lihat perenggan 26, 28 & 30).

(3) Plaintif telah berjaya menunjukkan bahawa defendan telah menerbitkan kenyataan fitnah dengan niat jahat terhadapnya dengan kegagalan mereka untuk mengesahkan tweet plaintif sendiri, apabila mereka sendiri bersetuju bahawa kenyataan fitnah mereka mempunyai implikasi serius kepada plaintif yang mana reputasi dan imejnya boleh terjejas akibat daripada itu. Selanjutnya, defendan tidak menerbitkan tweet dalam bentuk dan bahan asal tetapi mereka telah menambah kepada tweet plaintif apa yang mereka fikirkan maksud kandungan tweet sebagaimana yang dimaksudkan oleh plaintif (lihat perenggan 46).

(4) Pembelaan perlindungan bersyarat dan pembelaan *Reynold* serta pembelaan komen yang adil juga gagal kerana terdapat niat jahat di pihak defendan apabila mereka menerbitkan laporan yang dipersoalkan tersebut (lihat perenggan 54).]

Notes

For cases on defences, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 425–449.

For cases on libel, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 523–723.

Cases referred to

Ayob bin Saub v TS Sambathamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152, HC (refd)

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494, CA (refd)

Lee Kuan Yew v Derek Gwyn Davies & Ors [1990] 1 MLJ 390, HC (refd)

Lee v Ritchie [1904] 6F (Ct of Sess) 642 (refd)

Ratcliffe v Evan [1892] 2 QB 524 (refd)

Reynolds v Times Newspapers Ltd and Others [2001] 2 AC 127, HL (folld)

S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)

Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)

YB Khalid bin Abdul Saad v Datuk Aziz bin Isham & Anor [2012] 7 MLJ 301, HC (refd)

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A *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Defamation Act 1957s 8

B **Appeal from:** *Civil Suit No 23 NCVC-84–07 of 2012 (High Court, Kuala Lumpur)*

Mohd Fitri bin Asmuni (Mohd Zamri bin Ibrahim with him) (Awi & Co) for the appellant/plaintiff.

Liew Tect Huat (Lim Qi Si and Wee Jason with him) (TH Liew & Partners) for the
C *defendants/respondents.*

Abang Iskandar JCA (delivering judgment of the court):

[1] This has been an appeal by Dato' Seri Mohammad Nizar bin Jamaluddin
D ('the plaintiff/appellant') against the decision of the learned High Court judge that had dismissed his claim against the first and second defendants namely, the Sistem Televisyen Malaysia Bhd and Rohani Ngah. The appellant/plaintiff had in his writ and statement of claim, filed in the Kuala Lumpur High Court (encl 1), prayed for the reliefs as prayed therein pertaining to an alleged
E defamation committed by the defendants against him. Among others, he had prayed for damages to be awarded to him by the defendants for the injury caused to his reputation by the alleged defamation perpetrated by the defendants. That alleged defamation was contained in the publication by the defendants in the *Buletin Utama TV3* news report ('Buletin Utama') of
F materials regarding the plaintiff's tweets on 28 May 2012 in his Twitter account.

[2] As a matter of factual background, the plaintiff at the material time was a member of Parliament, a member of the state legislative assembly of Perak for
G Pasir Panjang, a member of the Central Committee of Parti Islam SeMalaysia ('PAS') and the Head of the Opposition *Pakatan Rakyat* for Perak.

[3] The first defendant was a broadcasting television company whereas the second defendant was sued in her capacity as the publisher of *Buletin Utama* for
H 30 May 2013 which was broadcasted in the TV3 channel at 8pm. As it had turned out, it all began with the plaintiff's tweets that the plaintiff had tweeted through his Twitter account on the 28 May 2012 whereby the plaintiff had made the following three statements:

I *YB Mohammad Nizar*

RM520K boleh dibelanjakan membantu rakyat melayu johor yang masih ramai miskin serta memerlukan bantuan keperluan hidup, bina 20 rumah pprt!;

YB Mohammad Nizar

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but if comparing 24 million diamond ring by rosmah, then RM520k 4 WWW1 reg plate is nothing! But how does 1 justify that purchase MFatwaKeb?;

YB Mohammad Nizar

RM520k utk no plate www1, Xkan nak letak kat proton atau motor kut? Ramai lagi rakyat yang masih kais pagi mkn pagi kais ptg mkn ptg!

[4] Pursuant to those tweets of the plaintiff, the undisputed facts would further show that the defendants had on the 30 May 2013 published the following news transcript that was read by the first defendant's news presenters at 8pm during the *Buletin Utama* news programme on TV3. The said transcript, as read by the two presenters, has been as follows:

NUR JAMALINA MOHD JAMALI:

POLIS MENUBUHKAN SATU PASUKAN KHAS UNTUK MENYIASAT TUDUHAN ADUN PASIR PANJANG. DATUK SERI MOHAMMAD NIZAR JAMALUDDIN, KONONNYA SULTAN JOHOR MENGGUNAKAN WANG RAKYAT UNTUK MEMBIDA NOMBOR PENDAFTARAN WWW1

KAMARUDIN MAPE:

MENURUT KETUA POLIS JOHOR, DATUK MOHAMMAD MOKHTAR SHARIFF, KES DISIASAT MENGIKUT AKTA HASUTAN.

KETUA POLIS JOHOR, DATUK MOHAMMAD MOKHTAR SHARIFF:

SEHINGGA PETANG INI, POLIS JOHOR TELAH MENERIMA 8 LAPORAN POLIS. JADI KITA TELAH MENUBUHKAN SATU PASUKAN KHAS YANG DIKETUAI OLEH KETUA POLIS DAERAH JOHOR BHARU UTARA, ASSISTANT KOMISIONER POLIS ROSLAN. KITA AKAN MELENGKAPKAN KERTAS SIASATAN SECEPAT MUNGKIN.

NUR JAMALINA MOHD JAMALI:

INDIVIDU DAN PIHAK BERKAITAN KATANYA, AKAN DIPANGGIL UNTUK MEMBANTU SIASATAN.

KERTAS SIASATAN AKAN DISERAHKAN KEPADA PEJABAT TIMBALAN PENDAKWARAYA SEBAIK SIASATAN SELESAI.

DATUK SERI NIZAR SEBELUM INI MENCETUSKAN KEMARAHAN RAKYAT JOHOR APABILA KENYATAAN MENERUSI TWITTERNYA MENUDUH SULTAN JOHOR, SULTAN IBRAHIM MENGGUNAKAN WANG RAKYAT UNTUK MEMBIDA NOMBOR PENDAFTARAN WWW1 BERNILAI 520 RIBU RINGGIT.

JUMLAH ITU KATANYA, LEBIH BAIK DIGUNAKAN UNTUK MEMBANTU GOLONGAN MISKIN.

TUDUHAN ITU KEMUDIAN DISANGKAL TENGKU MAHKOTA

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JOHOR, TUNKU ISMAIL IDRIS YANG BERTITAH, BAGINDA DAN AYAHANDA BAGINDA TIDAK PERNAH MENERIMA WANG YANG DIBERI KERAJAAN.

SEBALIKNYA SEMUA WANG YANG DIPERUNTUKKAN UNTUK KERABAT DIRAJA JOHOR DISALURKAN KEPADA YAYASAN IBRAHIM DAN YAYASAN ISKANDAR UNTUK BANTUAN KEPADA RAKYAT DAN KERAJAAN NEGERI.

SEHUBUNGAN ITU, DATUK SERI NIZAR DIMINTA SELIDIK TERLEBIH DAHULU SEBELUM MENGELUARKAN KENYATAAN.

KAMARUDIN MAPE:

SEMENTARA ITU, PEMUDA UMNO PULAI DAN BEBERAPA PERTUBUHAN BUKAN KERAJAAN MEMBUAT LAPORAN POLIS TERHADAP DATUK SERI NIZAR.

LAPORAN DIBUAT SETIAUSAHA KERJA PEMUDA UMNO PULAI ASYIK RAHMAT Dl BALAI POLIS TAMPOI, MALAM SEMALAM.

SELAIN MEMBUAT LAP0RAN BAGI MEMBOLEHKAN POLIS MENJALANKAN SIASATAN, MEREKA JUGA MENDESAK DATUK SERI NIZAR MEMOHON MAAF SECARA TERBUKA.

KENYATAAN DATUK SERI NIZAR DIANGGAP SEBAGAI BIADAP TERHADAP SULTAN JOHOR DAN MEREKA SEBAGAI RAKYAT JOHOR AMAT MARAH DAN TERSINGGUNG DENGAN KENYATAAN ADUN PASIR PANJANG ITU.

NUR JAMALINA MOHD JAMALI:

SEMENTARA ITU DATUK SERI NIZAR MENERUSI TWITTERNYA MEMOHON MAAF BERHUBUNG KENYATAAN YANG DIKELUARKANNYA. BELIAU TURUT MENAFIKAN KENYATAAN ITU BERBAUR HASUTAN.

APA YANG DINYATAKAN SEBELUM INI TIDAK SAMA SEKALI MEMPERTIKAIKAN KEPUTUSAN SULTAN JOHOR UNTUK MEMBIDA NOMBOR PENDAFTARAN ITU DENGAN HARGA TERTINGGI.

KENYATAAN ITU KATANYA, DIBUAT HANYA SECARA UMUM ATAS PANDANGAN SEORANG RAKYAT.

[5] It was the contention of the plaintiff that the news report was carried under the heading 'Pasukan Khas Siasat Dakwaan Nizar' where the photograph of the plaintiff was also published alongside during the publication of the impugned news item.

[6] The plaintiff had claimed that he was defamed by the defendants by the words published by the defendants as appeared and averred in para 5 of his statement of claim. The alleged defamatory words had been as follows:

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'DATUK SERI NIZAR SEBELUM INI MENCETUSKAN KEMARAHAN RAKYAT JOHOR APABILA KENYATAAN MENERUSI TWITTERNYA MENUDUH SULTAN JOHOR, SULTAN IBRAHIM MENGGUNAKAN WANG RAKYAT UNTUK MEMBIDA NOMBOR PENDAFTARAN WWW1 BERNILAI 520 RIBU RINGGIT.'

[7] The learned High Court judge, sitting at Kuala Lumpur, having heard the evidence placed before her had considered the same and had dismissed the plaintiff's claim against the defendants, essentially on the ground that the defendants had succeeded in availing themselves of the *defence of justification*. In other words, while she had found the impugned publication by the defendants to be defamatory, such publication was justified.

[8] With regard to the other defences of fair comment and qualified privilege, she had found that on the facts, there was *no malice* shown on the part of the defendants when they published the news report which the learned judge had initially found to be defamatory.

[9] Having then dismissed the plaintiff's claim, she had declined to award any costs to the defendants and had ruled that each party bear their own costs. There is thus a cross-appeal by the defendants against her order on costs but only to the extent of non-order of costs having been made in their favour.

[10] The law on defamation is rather trite. The onus lies on the plaintiff to establish, on the balance of probabilities, that the impugned statement that the defendant had published had in fact referred to the plaintiff and that it had got the tendency of bearing a defamatory meaning. There must be publication of the alleged defamatory statement and it is publication as soon as it is published to a third person (see *Ayob bin Saub v TS Sambathamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152). In this case, the issue of publication is not disputed and neither was the fact that the impugned news report had referred to the plaintiff had been a subject of any serious dispute or at all.

[11] As to the meaning of 'tendency of bearing a defamatory meaning' perhaps a reference to the speech by learned Justice Mohd Azmi J in the case of *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 would be helpful to illustrate the point:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?

[12] So, the law is clear in its definition as to what would amount to a

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defamatory statement. Indeed in this case the learned trial judge had referred to the *Halsbury's Laws of England* (4th Ed) p 7 in order to get a definition of what would constitute a defamatory statement in law. At p 7 of her grounds of judgment she had, when citing *Halsbury's Laws of England*, so stated as follows:

> A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to his office, profession, calling, trade or business.

[13] We find nothing wrong with such statement of the applicable legal principle by the learned trial judge on that score.

[14] With this statement of legal principle, the learned trial judge had then proceeded to consider one of the questions posed before her, namely whether or not the evidence before her had, as per the news report published by the defendants, indeed been defamatory of the plaintiff. At p 11 of her grounds of judgment, she had then concluded as follows:

> The court finds that the defendants' publication, considered in its natural and ordinary meaning of the words used, and having regards to the ordinary intelligence and knowledge of the worldly affairs that a reasonable man on the street possesses, are defamatory of the plaintiff.

[15] It is noted that there was no appeal against this finding by the defendants. Clearly they were relying on their defences to negative the plaintiff's claim against them.

[16] The learned trial judge then proceeded to consider the defences as raised by the defendants and concluded that on the ground of justification alone, the defendants ought to succeed in their defence against the plaintiff's claim which she had then dismissed. On the other two defences of fair comment and qualified privilege and fair journalism, the learned judge had found no malice on the part of the defendants when they published the defamatory statement against the plaintiff. In her grounds of judgment, the learned judge was quite firm in her conviction that on the ground of justification alone, the plaintiff's claim ought to fail and so she had decided.

[17] The plaintiff was aggrieved by the decision adverse against him and had appealed before this court. So, the question before this court was whether the learned trial judge was correct, in the circumstances of this case, in deciding the way she did when she dismissed the plaintiff's claim against the defendants.

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THE DEFENCE OF JUSTIFICATION

[18] As the issue of the impugned publication having been found to be defamatory of the plaintiff has not been a subject of any appeal by the defendants, we therefore would proceed to consider whether the learned trial judge had been correct in saying that the defences that had been erected by the defendants had been established so as to deny the plaintff's claim against them.

[19] Under the law, both at common law as well as under our statutory regime, justification provides a complete defence to the defendant in a defamation suit. Under the Defamation Act 1957, such defence resides under s 8 therein. Learned Justice Zainun Ali JCA (as she then was) had occasion to interpret the said s 8 and this is what she had said:

> In other words, purposive approach is taken in interpreting Section 8-when for a defence of justification to be upheld, it is not necessary to prove the truth of every word in the statement said to be defamatory. What is relevant is actually the truth of the imputation of the overall statement. (see the case of *Chong Swee Huat & Anor v Lim Shian Ghee (t/a L&G Consultants & Education Services* [2009] 3 MLJ 665)

[20] At p 15 in her grounds of judgment, the learned trial judge had summarised the task that she had to deal with in the following manner:

> It is the plaintiff's case that the *Buletin Utama* wrongly accused him of making the allegation that the Sultan of Johor had used public funds to bid for WWW1. The defendants submitted that the words in the *Buletin Utama* are true in substance and in fact. If the defendants are able to show that the plaintiff had indeed substantially made such an allegation against the Sultan of Johor, then the defence of justification would succeed.

[21] The learned judge having found that the impugned publication was defamatory, it would therefore be prudent to remind ourselves what was defamatory about the publication. It is this; that the twitter of the plaintiff had been manipulated by the defendants by defaming the plaintiff in that the plaintiff had accused the Sultan of Johor of making use of public funds to buy the plate number WWW1. In order to succeed in the defence of justification, the defendants would have to prove that the said defamatory statement as published by the defendants over TV3 was true, or was substantially true. In other words, can the words as contained in the twitters of the plaintiff be interpreted as accusing the Sultan of Johor of having used public funds to buy the plate no WWWI at the bidding price of RM520,000.

[22] From the reading of the original tweets attributable to the plaintiff, what has been said is that a big sum of money was used to buy a plate number WWW1. It was not stated in any of the three tweets whether the money used

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was public money or the person's own money. It may be an advice not to spend lavishly when that large sum of money could be used to assist the poor in Johor. The word 'menuduh' (to accuse) was never used in the tweets. But when the defendants published the news it had become such that the plaintiff had accused the Sultan of Johor of having made use of public funds to buy the plate no WWW1 to the tune of RM520,000.

[23] We had juxtaposed the statements from the plaintiff's tweets and that of the defendants' as published by them in the news item, next to each other and we were in agreement with the submissions of learned counsel for the plaintiff that the defendants had not only given an unwarranted slant to the tweets but also they had added facts allegedly attributable to the tweets when these added facts were not tweeted by the plaintiff in those tweets.

[24] Again, perhaps we should go back to what in essence is required to be established by a defendant who is desirous of putting up a defence of justification in facing up a defamation suit. In relying on the defence of justification the burden of proof is on the defendant to prove that the allegations made are true or are substantially true. The defendant must prove it on the balance of probabilities, that is, the allegation is more likely than not to be true. For example, an allegation published by repeating a rumour cannot be justified by proving that there was such a rumour. A defendant is required to prove the substance of the allegation. Since the burden of proving the truth of an allegation is on the defendant, claimants enjoy a distinct advantage in defamation claims. Justification has to be used with great care. It can often be difficult to obtain sufficient admissible evidence to persuade the judge that the statement is true. This will sometimes result in the media being unable to publish allegations which are generally believed to be true, but which they may not be able to prove to the standard required in court. Further, an unsuccessful defence of justification is likely to increase the level of any damages awarded.

[25] But once the defence is successfully established it affords a complete defence against a defamation suit by a claimant. It is not necessary for a defendant to show that there was a public interest in publication and it does not matter whether he or she acted maliciously. The law recognises that to be the case because the defendant has established the truth of what he had stated however defamatory it has been against the plaintiff. As an illustration, if A were to accuse B of being a bankrupt, which is ipso facto a statement capable of being deemed defamatory, A will nevertheless be exonerated if he can successfully prove that B was indeed a bankrupt at the time the defamatory statement was made by A.

[26] In the case before us, the defendants had published the defamatory statements based on their own interpretation of what the plaintiff's tweets had

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meant. They never did any verification as to the meaning contained in the plaintiff's tweets from the plaintiff himself. They had said that their belief with regard to the meaning of the plaintiff's tweets was based on the tweets attributable to the Tengku Mahkota Johor ('TMJ') which had purportedly rebutted the contents of the plaintiff's tweets.

[27] The learned trial judge had accepted the defendants' contention on this point. This was what the learned trial judge had said, at p 33 *Jilid* 1 ROA:

> Therefore, it is without doubt that the Crown Prince's tweet message was a direct response to the plaintiff's tweet messages. In fact, the Crown Prince ended his tweet with the words, 'So before You open your mouth, Do your research'.

[28] In this regard, the plaintiff had taken the issue that the defendants had admitted that they had not verified from the TMJ himself as to the contents of his alleged tweet and more crucially, they had not verified whether the said Twitter account attributable to the TMJ was indeed an account that was maintained by him at the material time.

[29] We see merit in this point as raised by learned counsel for the plaintiff. In the case of *YB Khalid bin Abdul Saad v Datuk Aziz bin Isham & Anor* [2012] 7 MLJ 301 learned Justice Prasad Abraham J had occasion to rule as follows:

> [19] In this case, the evidence is clear that the second defendant just picked up the article of YB Zulkifli Noordin from his official blog and republished it in toto without any verification of the article at all. The second defendant maintains that the impugned article was extracted from the official blog of YB Zulkifli Noordin and as he was MP, it was thought safe to rely on it. The court rejects that argument in toto.

[30] Again, in the case of *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390 learned Justice Thean J from the Singapore High Court had ruled that the defendants there had failed to prove their pleaded justification in that they had failed to call the Archbishop to substantiate their allegations. As such, there existed no evidence before the court that the plaintiff had resorted to any trickery or improper pressure to cause the Archbishop to attend the conference and make the statement which he made. As such, the court there found that the defendants had failed to prove their defence of justification.

[31] Under the circumstances, the defendants here had also failed to establish their defence of justification on the balance of probabilities in the light of the fact that they had themselves failed to verify the genuineness of the purported TMJ's tweet and Twitter account, whereby they had purportedly

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acted on the TMJ's tweet as a basis to found a genuine belief that the defamatory statement that they had published was true or was substantially true.

[32] On this defence of justification, the learned trial judge had taken into account the issue of PPRT as a basis to justify the defendants' defamatory statements against the plaintiff. The plaintiff had complained that this issue of PPRT was not pleaded by the defendants in their pleadings regarding justification. After considering the submissions, we find that there is merit in that contention in that the court is as much bound by the pleadings of parties that appear before them. This legal principle was clearly reiterated by the Supreme Court in the case of *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 when it had ruled that as the trial judge had made a decision on an issue which was not raised by the parties in their pleadings the appeal must be allowed and the order of the learned judge in dismissing the plaintiff's claim be set aside.

DEFENCE OF QUALIFIED PRIVILEGE

[33] On the defences of fair comment and qualified privilege, the learned trial judge had upheld those defences in favour of the defendants, on account that there was no *malice* on the part of the defendants when they published the news containing the defamatory statements against the plaintiff.

[34] In a defence of qualified privilege, truth is not a pre-requisite but it can only succeed if there is no malice in such publication. If untrue defamatory allegations are published on an occasion of privilege, they will be protected from a claim for defamation. Although the law of defamation exists to protect reputations, it is recognised that in particular situations it is to the benefit of society generally for people to be able to communicate without the fear of being sued for defamation. This is so despite the risk that a person's reputation will be damaged and they will not be able to restore it by bringing a claim for defamation. Its rationale resides in the consideration that a general public good in such exercise overrides the need to protect individual reputation.

[35] Although the learned trial judge had considered the defence of qualified privilege and the *Reynold*'s defence, she did not actually come to a definitive conclusion on the matter. She had anchored her dismissal of the plaintiff's claim based on her earlier finding that the defendants had successfully established the defence of justification, which is an absolute and complete defence against a charge of defamation. Indeed, she had said, 'However, I need to emphasise here that earlier on in this judgment, I had held that the complete defence of justification of the defendants is allowed, and that the plaintiff's action ought to be dismissed on that ground.' It is clear in the ten guidelines as outlined in the case of *Reynolds v Times Newspapers Ltd and Others* [2001] 2 AC

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127 one of them has been the requirement that the defendant has to verify the information to be published from the maker of the same. Despite such failure on the part of the defendants to so verify, the learned trial judge had proceeded to rule that although the defendants had failed to practice responsible journalism by not verifying with the plaintiff on his tweet messages, such failure was mitigated by the absence of malice on the part of the defendants. In short she had not seen anything amiss beyond that.

[36] In the defence of qualified privilege, the underlying exonerating element is that the defamatory statements were made without malice. The law is that it lies on the plaintiff to show that there was malice that had actuated the defendant when he published the impugned statements. In other words, it is not for the defendant to show that it had published the impugned statement without malice. We noted that the plaintiff in this case had recognised this and had averred in his reply to the statement of defence that the defendants had published the news report with malice aforethought.

[37] We are of the view that malice, not unlike intention, is a state of mind. Invariably, unless there is an express admission by the defendant that he has been malicious in his conduct, then the presence of malice can only be deduced or inferred from the circumstances obtaining in each case. In the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 Wan Hamzah J (as he then was) had this to say on the subject matter of malice, at p 179 of the report:

> Where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, malice may rightly be inferred.

[38] The English case of *Lee v Ritchie* [1904] 6F (Ct of Sess) 642 was cited as authority for such legal proposition. With respect, the position as stated by learned Justice Wan Hamzah J still remains good law.

[39] Having considered the evidence and the submissions placed before us, we agree with the learned trial judge that, with regard to the defence of qualified privilege, there was public interest element in the tweets of the plaintiff that merited it to be published. We noted that the learned trial judge had made the finding that the defendants had failed to practise responsible journalism when they published the defamatory statements. Indeed, she had ruled as follows: ... the defendants did not practise responsible journalism in verifying with the plaintiff himself regarding his tweet messages and getting his comments on the matter. The defendants' publication was lop-sided, leaning towards giving a negative impression about the plaintiff even before the police have completed their investigations. (p 40, *Jilid* 1, ROA)

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[40] Having so found, the learned trial judge had then ruled that there was no malice on the part of the defendants when they published the defamatory statements. She had so ruled because she had found that the plaintiff had failed to show that the defendants were a mouthpiece of UMNO and that in the past, the defendants had also carried reports news on UMNO which were not in good light and that they had chastised UMNO for their shortcomings, for example stories regarding Khir Toyo the former Menteri Besar of Selangor.

[41] The learned trial judge then said that the failure on the part of the defendants to verify was mitigated by the lack malice on their part and that she had earlier on ruled that the defendants had succeeded in establishing the complete defence of justification. She said that since the defendants was successful in establishing justification she was inclined not to deny them the benefit of the defence of qualified privilege.

[42] To our mind, the learned trial judge had erred there. The defences of justification and qualified privilege are separate defences and ought to be considered separately and not be tied to one another. Their constituent ingredients that needed to be established are different.

[43] We had alluded to the fact that the learned trial judge had found nothing malicious in the failure of the defendants to verify the tweets from the plaintiff before publishing their interpretation of the same to all and sundry, as required by the *Reynold*'s case defence criteria. Indeed the learned trial judge had also found that the defendants had failed to observe the guidelines as contained in the *Reynold*'s decision and that the defendants had practised poor and irresponsible journalism.

[44] But the learned judge had stopped short of finding the defendants liable, on account of the fact that there was an absence of malice on the part of the defendants. On the other hand, the plaintiff had contended that such failure had evidenced a clear indication that the defendants were actuated by malice aforethought when they published the defamatory statements. The law reports are replete with decisions on the issue of malice in relation to the defence of qualified privilege.

[45] In the case of *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390 the factual matrix of the case has shown that:

> No attempt, however, was made by either the first or the second defendant or anyone on behalf of the third defendants to verify any of the facts or matters provided by D'Souza. Both the first and second defendants accepted the documents at their face value; the second defendant composed and wrote the article, and the first defendant approved it and its publication. In this case, they acted recklessly ...

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According to learned Justice Thean J.

> In the court's judgment, the conduct of the first and second defendants is evidence of malice on their part.

[46] In this regard, in the immediate appeal before us, we are of the view that the plaintiff had succeeded in showing that the defendants had published the defamatory statements with malice against him by their failure to verify the tweets with the plaintiff himself, when they themselves agreed that the defamatory statements were serious in their implications vis-a-vis the plaintiff whereby his reputation and image could be adversely affected as result thereof. In this case, we note that the defendants had not published the tweets in their original form and substance, but that they had instead added on to the plaintiff's tweets what they thought the tweets meant as to their contents as intended by the plaintiff. Then they had it published as their news item over TV3 at prime time news slot. The learned trial judge had found the publication as defamatory of the plaintiff. She had also observed that 'the defendants' publication had certainly put the plaintiff in a tight spot, with such wide publicity, at a time when there was already a strain in his relationship with the Johor Royalty.'

[47] The defendants had admitted that it would not be difficult to contact the plaintiff for the verification purpose, but had decided not to because they believed that the plaintiffs tweets were self-explanatory. Unlike in the *Lee Kuan Yew*'s case, the defendants here did some verification, but not from the proverbial horse's mouth himself, being the plaintiff. Instead of first verifying with the plaintiff himself, the defendants had seen it fit to verify from the police and from an UMNO branch in Johor, the latter being a clear political nemesis of the plaintiff, bearing in mind the political affiliation of the plaintiff at the material time. Clearly to our mind, there was malice on the part of the defendants to be inferred as they had, in the circumstances of this case, deliberately stopped short in their inquiries in order not to ascertain the truth. Knowing very well the dire consequences that could befall the plaintiff as a result of the published news item regarding the plaintiff's tweets, the defendants had nonetheless proceeded to air the news to the wide spectrum of national TV audience without first verifying with the plaintiff. At this juncture, it would be apt to recall what the learned trial judge had said on the potential effect of the defamatory statements on the plaintiff, which is now reproduced:

> It should be noted that until today the public prosecutor has not preferred any charge against the plaintiff for sedition or other criminal offence. The defendants' publication had certainty put the plaintiff in a tight spot, with such wide publicity, at a time when there was already a strain in his relationship with the Johor Royalty.

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[48] As such, it is not difficult to see the reckless conduct of the defendants in publishing the defamatory statements in the circumstances. Such conduct has clearly evinced the presence of malice on the part of the defendants in publishing the defamatory statements against the plaintiff. As such the defendants could not avail themselves of the defence of qualified privilege in this case.

[49] Apart from this, the malice on the part of the defendants can also be inferred from the fact that there was failure on the part of the defendants to also publish the plaintiff's tweets in their original form, when at the same time they were able to publish the purported TMJ's tweet in its original form.

DEFENCE OF FAIR COMMENT

[50] The law on the defence of fair comment is that if a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, he or she can rely on the defence of fair comment. The courts have said that whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on or what may happen to them or to others, then it is a matter of public interest on which everyone is entitled to make fair comment.

[51] The comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail. As with justification, the defendant does not to have to prove the truth of *every* fact provided the comment was fair in relation to those facts which are proved. However, fair in this context, does not mean reasonable, but rather, it signifies the *absence of malice*. The views expressed can be exaggerated, obstinate or prejudiced, provided they are *honestly* held. If the claimant can show that the publication was made maliciously, the defence of fair comment will not succeed.

[52] In this case, as regards the defence of fair comment, the learned trial judge had ruled that there was no malice being present when the defendants made the defamatory statements. We had deliberated on the matter of malice in dealing with the defence of qualified privilege above. Suffice for us to say that as a matter of law, the defence of fair comment, like one of qualified privilege, depends on the fact that when it was made, it was made without malice. It is for the plaintiff to prove that the impugned statement was made with malice aforethought.

[53] In this case, on the same reasons as above, pertaining to our findings on the defence of qualified privilege, the defendants, with respect, cannot succeed

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on the defence of fair comment because there was malice that can be readily inferred from the surrounding circumstances as found in the evidence pertaining to the publication of the defamatory statements against the plaintiff. With respect, we agree with learned counsel for the plaintiff on that score.

CONCLUSION

[54] Having taken into account the materials placed before us in this appeal, we are of the considered view that the decision of the learned trial judge cannot, in the circumstances be sustained and is hereby set aside. On the evidence, the defendants are found liable for the defamation and that they had failed to establish the defence of justification. They had failed to establish that what they had published pertaining to the appellant's tweets was true or was substantially true. In respect of the defences of qualified privilege and the *Reynold*'s defence as well as the defence of fair comment, there was malice on the part of the defendants when they published the news report on the plaintiffs tweets on the 30 May 2012. As such, judgment is hereby entered in favour of the appellant against the defendants in terms of the prayers in his statement of claim.

DAMAGES

[55] It is trite law that in a defamation suit, whether for slander or libel, the law presumes that some damages will flow from the publication. This position has long been established by learned Lord Justice Bowen in the case of *Ratcliffe v Evan* [1892] 2 QB 524 at p 528 where he said:

> The law presumes that some damages will flow in the ordinary course of things from the mere invasion of his absolute right of reputation.

[56] It therefore only leaves the issue of quantum to be determined. The law obligates the court to take into account several factors in determining the amount of damages to be paid by the defendant to the plaintiff (see generally, *Defamation law, Procedure & Practice* by Price & Duodu (3rd Ed), para 20–04 at p 208, as cited by learned justice Gopal Sri Ram JCA (as he then was) in the case of *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494).

[57] As such, this case is remitted back to the High Court to have the damages assessed by the learned trial judge.

[58] In the circumstances, the appeal by the defendants on the order of costs in the court below does not now arise and is hereby dismissed. The defendants are ordered to pay costs of this appeal, all costs incurred below including costs of all the proceedings before the learned trial judge on the issue of damages.

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A *Order accordingly.*

Reported by Kanesh Sundram

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